

Letter of Findings Number: 04-20110458
Sales and Use Tax
For the Years 2008, 2009, and 2010

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ISSUE

I. Sales and Use Tax – Manufacturing and Processing Exemptions.

Authority: IC § 6-2.5-4-2; IC § 6-2.5-5-3; IC § 6-2.5-5-30; IC § 6-8.1-3-3; [45 IAC 2.2-5-8](#); [45 IAC 2.2-5-10](#); Indianapolis Fruit Co. v. Indiana Dep't of State Revenue, 691 N.E.2d 1379 (Ind. Tax Ct. 1998); Dep't of Revenue v. U. S. Steel Corp., 425 N.E.2d 659 (Ind. Ct. App. 1981); Mumma Bros. Drilling Co. v. Indiana Dep't of State Revenue, 411 N.E.2d 676 (Ind. Ct. App. 1980); Letter of Findings 85-7141-ST (August 12, 1986); Letter of Findings 81-4975-ST (July 27, 1982).

Taxpayer protests the assessment of use tax with regards to certain equipment.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer's business consists of taking slag from a steel mill, cooling the slag, and removing any iron from the slag. Taxpayer returns the steel to the steel mill. With regard to the remaining slag, Taxpayer sorts and sells the materials resulting from three slag pits for various purposes. For a fourth slag pit, the steel mill retains title to the slag and eventually sells the slag.

The Department conducted a sales and use tax audit of Taxpayer. The Indiana Department of Revenue ("Department") determined that Taxpayer was a manufacturer only with regard to a portion of Taxpayer's operations. Thus, based on the Department's review of what portions of Taxpayer's process was manufacturing, the Department determination was that Taxpayer was subject to use tax on various pieces of equipment that Taxpayer purchased. As a result, the Department issued a proposed assessment of use tax against Taxpayer. Taxpayer protested the assessment, the Department conducted an administrative hearing, and this Letter of Findings results. Additional facts will be supplied as necessary.

I. Sales and Use Tax – Manufacturing and Processing Exemptions.

DISCUSSION

Taxpayer protests the assessment of use tax on several items of equipment. The issue is whether Taxpayer uses the equipment in manufacturing and/or industrial processing.

Taxpayer explains that its process begins when slag—2,500 to 2,700 degree liquefied impurities from the steel mill's steel production process—enters slag pits. Immediately upon the slag's entry into the slag pits, Taxpayer adds water to the slag.

According to Taxpayer, the addition of water accomplishes two primary objectives. One, the addition of water to the slag and the fact that the materials in the slag cool at different rates allows the separation of remaining iron components from the remainder of the slag. The iron is returned to the steel mill for use in the steel mill's production processes. Second, depending on the amount of water and the pressure of water applied to the slag, the resulting end product can result in larger, rock-like products if less water and/or pressure is applied, or smaller, sand-like products if more water and/or pressure is applied.

Taxpayer has two separate processes within its operations. The first process involves three slag pits. From these pits, Taxpayer obtains title to the slag at the moment the slag enters the slag pits. Taxpayer cools the slag, removes any iron from the slag at various points in the process, and returns the iron to the steel mill. With regard to the remaining slag, Taxpayer sorts, crushes, and eventually sells the end product resulting from the three slag pits.

Taxpayer also receives slag from a fourth slag pit. However, Taxpayer uses a slightly different process with regard to the slag from the fourth slag pit. The most important difference is that Taxpayer adds additional water to produce a granulated product. Further, Taxpayer never obtains title to the slag or any materials in the slag. The steel mill—as opposed to Taxpayer—retains title to the slag at all times and sells the end product.

A. "Air-cooled" Slag

The first operation to be discussed is the slag produced from three of the steel mill's slag pits (i.e., the slag from furnaces other than No. 14 Blast Furnace). The technical term for the end product resulting from the process is "air-cooled" slag. However, despite the seemingly passive nature implied by technical term, "air-cooled" slag is not the result of merely subjecting slag to air and allowing the slag to cool.

Under the terms of the agreement between Taxpayer and the steel mill, title to the slag passes to Taxpayer upon entry of the slag into the slag pit. However, the steel mill retains title to any metallic content that may have blended into the slag.

IC § 6-2.5-5-3(b) provides:

Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

In addition, [45 IAC 2.2-5-8](#)(c) states:

The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

Further, [45 IAC 2.2-5-8](#)(d) provides:

Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

Also, [45 IAC 2.2-5-8](#)(k) provides:

"Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property" is performance as a business of an integrated series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change, and it must result in a transformation of property into a different product having a distinctive name, character, and use. Operations such as compounding, fabricating, or assembling are illustrative of the types of operations which may qualify under this definition.

In *Indianapolis Fruit Co. v. Indiana Dep't of State Revenue*, 691 N.E.2d 1379 (Ind. Tax Ct. 1998), a fruit and vegetable supplier claimed that its banana and tomato ripening constituted manufacturing and claimed a sales and use tax exemption on items used in its ripening processes. The court determined that the supplier's banana ripening booths constituted manufacturing because ethylene, a gas that promoted a ripening process that would not have otherwise occurred, was actively added by the supplier. The court further noted the chemical and other changes that occurred during the banana ripening process and concluded that "integral and essential" items used in the banana ripening process were exempt from sales and use tax. Id. at 1385.

However, the court ruled that the supplier's process with regard to the tomato ripening process was a passive process and denied the manufacturing exemption for the items used in tomato ripening. Id. The court contrasted the supplier's passive process of tomato ripening to the active process in banana ripening. Id. at 1385-86.

In Taxpayer's case, the application of water to the slag begins a process of changing the molecular structure of the slag, the end result of which is removal of certain chemicals and metals from the slag that would render the slag (absent the active process) commercially unusable. The cooling of the product is an active first step in Taxpayer's production of finished aggregate products, similar to the active step of adding ethylene to bananas in order to promote ripening in *Indianapolis Fruit*. The application of water to the slag—an agent that promotes and accelerates the transformation of slag from a molten liquid to a commercially-usable solid product—is the first step of Taxpayer's process. The issue is what remaining processes constitute manufacturing.

Taxpayer's process then requires Taxpayer to transport the slag to a stockpile area. In the stockpiling area, the slag is permitted to further cool and is manipulated to cool the slag, to allow chemical changes and to permit further metal removal. The stockpiled slag is loaded onto conveyors to crushing and screening equipment. The Department did not assess items used at the crushing and sorting stage.

Taxpayer has provided sufficient information to conclude that its process, up to and including crushing and screening the slag, constituted an integrated process of transforming personal property within the ordinary course of Taxpayer's business.

Prior to sale but after crushing and screening the slag, Taxpayer "bales" the crushed slag. Taxpayer performs this step in order to prevent settling of the crushed slag. Further, the slag must pass a leachate test before it can be sorted, weighed, and sold to Taxpayer's eventual customers. If the slag is not properly leached, the slag would have a higher pH value. Slag with a higher pH value would result in potential chemical interactions with the product and also create potential environmental hazards.

The slag is not in its final form until enough of certain basic (high pH) chemicals have been removed from the slag. Thus, under [45 IAC 2.2-5-8](#)(d), Taxpayer's production process includes the leaching of the crushed slag. The leaching of slag is the last step in Taxpayer's production process of "air-cooled" slag.

B. "Granulated slag"

Taxpayer also has a second line of processes. Largely separate from its production of "air-cooled slag," Taxpayer processes "granulated slag." Taxpayer uses slag from one of the steel mill's slag pits for the creation and production of "granulated slag." The "granulated slag" is generally used in cement mixes.

The start of Taxpayer's process of creating "granulated slag" is the addition of water, which is not materially different than its production of the other slag. However, because of the extra water and pressure that is required to be used in order to create "granulated slag," Taxpayer must have excess water drained prior to further transport. Once the "granulated slag" is sufficiently dry, the slag is then moved to a separate stockpile for further

removal of impurities. Once the "granulated slag" has achieved the proper chemical composition, the slag is delivered to the steel mill's customers. At all times until sale of the slag to the end customer, the steel mill retains title to the "granulated slag."

IC § 6-2.5-5-3(b) provides:

Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

In addition, [45 IAC 2.2-5-8\(k\)](#) provides:

"Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property" is performance as a business of an integrated series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change, and it must result in a transformation of property into a different product having a distinctive name, character, and use. Operations such as compounding, fabricating, or assembling are illustrative of the types of operations which may qualify under this definition.

With regard to "granulated slag," Taxpayer has provided sufficient information to conclude that its process begins with addition of water to the slag generated by the steel mill.

However, in *Mumma Bros. Drilling Co. v. Indiana Dep't of State Revenue*, 411 N.E.2d 676 (Ind. Ct. App. 1980), the court held that a company engaged in drilling water wells and installing pumps for its customers' use was not engaged in manufacturing. In particular, the court stated:

We think the word "manufacturing" found in exemption six connotes a resale of the tangible personal property that is extracted, and thus, the exemption prevents taxation at the wholesale level. Exemption six [IC § 6-2-1-39(b)(6), repealed 1980 and replaced by IC § 6-2.5-5-3(b)], fairly read, is meant to exempt capital equipment that meets the "double direct" test. We do not think the exemption was meant to apply to extraction of water for personal and not for resale use.

Id. at 678. In Taxpayer's case, Taxpayer is processing the "granulated slag" for the steel mill's ultimate sale and not its own sales, just as the drilling company in *Mumma Bros. Drilling* was digging wells and installing pumps for the drilling company's customers. Even though Taxpayer is engaged in a process that transforms molten slag to a granular slag product usable for various commercial applications, Taxpayer is not engaged in manufacturing within the meaning of IC § 6-2.5-5-3 because Taxpayer does not sell the "granulated slag." Thus, Taxpayer is not permitted the exemption under IC § 6-2.5-5-3 with regard to equipment (or the portion thereof) used to produce "granulated slag."

However, Taxpayer's process is one that produces significant, molecular-level change of molten slag to a granulated product usable in cement and other commercial applications. The "granulated slag" is sold by the steel mill to third parties. Under IC § 6-2.5-4-2(c) and [45 IAC 2.2-5-10\(a\)](#), an industrial processor is defined as a person who:

- (1) acquires tangible personal property owned by another person;
- (2) provides industrial processing or servicing, including enameling or plating, on the property; and
- (3) transfers the property back to the owner to be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in his business of manufacturing, assembling, constructing, refining, or processing.

Further, [45 IAC 2.2-5-10\(k\)](#) provides:

Processing or refining is defined as the performance by a business of an integrated series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change. Operations such as distilling, brewing, pasteurizing, electroplating, galvanizing, anodizing, impregnating, cooking, heat treating, and slaughtering of animals for meal or meal products are illustrative of the types of operations which constitute processing or refining, although any operation which has such a result may be processing or refining. A processed or refined end product, however, must be substantially different from the component materials used.

In this case, Taxpayer has demonstrated that its process changes the slag from a molten material to a granular solid material usable in cement and other applications. This end product is "substantially different" than the slag acquired by Taxpayer. The steel mill from whom the slag is acquired sells the "granulated slag." Thus, Taxpayer has established that it is an "industrial processor" of the steel mill's slag pursuant to IC § 6-2.5-4-2(c). Further, Taxpayer has established that the "integrated series of operations" begins when the slag is cooled with water in the steel mill's pits and ends when the slag is rendered commercially usable by the steel mill's customers.

C. Items Claimed to be Exempt

Taxpayer claimed exemptions for various items of tangible personal property. Each item will be discussed in turn. Taxpayer has provided evidence that its WA800 wheel loaders, HD-465 slag haul trucks, WA600 wheel loaders, and conveyor system are used to transport slag between parts of the production process and therefore are exempt under [45 IAC 2.2-5-8\(f\)\(3\)](#), which provides an exemption for vehicles and equipment used to transport

work in process between points in a production process.

However, the exemption for any item listed under this part only applies to the extent the item is used during any exempt process. For purposes of determining the percentage exemption, metal removal prior to the end of any exempt process shall be considered part of the exempt process. The exact percentages for which any item is exempt will be determined upon a supplemental audit.

In addition, Taxpayer sought an exemption for various other items. These items will be discussed in turn.

1. D-9 Bulldozer

Taxpayer states that the D-9 bulldozer ("Bulldozer") "[b]rings about changes directly to the slag work-in-process by blending and manipulating [unfinished slag stockpiles]." The blending and manipulation occurs prior to loading the slag onto the conveyor system. The Bulldozer also removes unwanted metals from the slag. Taxpayer states that the Bulldozer "must be used to maintain the stockpiles of unfinished slag effectively in order for production to flow continuously and efficiently."

The Bulldozer is used at an intermediate stage of the process, after the initial application of water that begins the process and stockpiling but before crushing and screening of the slag. The Bulldozer also assists in metal removal necessary to produce the final, usable product. Further, the blending and manipulation of slag assists in the crushing and sorting portions of Taxpayer's process.

Accordingly, with regard to the Bulldozer, Taxpayer has provided sufficient information that the Bulldozer is used after the point where production begins but before production ends. As such, it is part of Taxpayer's "integrated series of operations" producing tangible personal property as opposed to Taxpayer's pre-production or post-production functions. Taxpayer has provided sufficient information to conclude that the blending, manipulation, and steel removal are necessary, integral intermediate steps that act directly upon the slag in allowing the slag to be properly processed. As such, the Bulldozer is an "integral and essential" item directly used in the direct production of tangible personal property. Therefore, Taxpayer's protest is sustained.

2. Skid Steer Loader

Taxpayer states that the skid steer loader is "used in and around the slag separator equipment to clean buildup of material and to allow processing to carry on continuously." Taxpayer explains that the skid steer loader prevents buildup of material around Taxpayer's crushing and screening equipment. If excess materials build up, the crushing and screening equipment would break down and/or present potential safety issues.

With regard to this item, Taxpayer has not provided sufficient information to conclude that the skid steer loader is used to manipulate, change, or otherwise transport slag during the production process. In other words, the skid steer loader does not have a direct effect on the slag.

However, [45 IAC 2.2-5-8\(c\)](#), example 2(F) provides:

The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

--EXAMPLES--

...

(2) The following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt. The fact that such equipment may not touch the work-in-process or, by itself, cause a change in the product, is not determinative.

...

(F) **Safety clothing or equipment which is required to allow a worker to participate in the production process without injury** or to prevent contamination of the product during production.

See also *Dep't of Revenue v. U. S. Steel Corp.*, 425 N.E.2d 659 (Ind. Ct. App. 1981) (holding that steel production could not occur without safety clothing and safety equipment for workers).

While the Department does not discount the important role of the skid steer loader in ensuring that the manufacturing process continues without interruption, Taxpayer has not provided sufficient information to conclude that the skid steer loader is required to allow Taxpayer's workers to participate in the slag production process without injury. Taxpayer has otherwise not provided sufficient legal or factual grounds to conclude that the skid steer loader is directly used in Taxpayer's direct production of slag. Thus, Taxpayer's protest is denied on the skid steer loaders.

3. WA500 Loaders and Bucket Scales

Taxpayer explains that it uses WA500 loaders and bucket scales (these will be referred to collectively as "WA500 loaders" for multiple purposes in its operations. For one thing, the loaders are used to bale slag "after it has moved from the crushing and screening equipment." The baling of slag is done in order to prevent larger pieces of slag from settling to the bottom of piles and also to promote leaching of the slag. The baling also prevents commingling of different slag varieties. Further, the balers are used to weigh slag for customers' requirements.

With regard to the WA500 loaders, the baling serves the purpose of enhancing the leaching process. The

leaching of slag is a necessary step in producing the end product. Thus, the baling process during the leaching process and prior to sale is part of Taxpayer's "integrated process which produces tangible personal property." To the extent the WA500 loaders are used in the baling process, Taxpayer uses the WA500 loaders in production and is sustained to the extent of that usage.

However, the portion of Taxpayer's use of the WA500 loaders for loading slag for sale after the slag has reached its final, marketable form is not exempt. Thus, Taxpayer's use of the WA500 loaders in the loading and weighing process is denied.

4. Grader, Water Truck, and Wagon

Taxpayer asserts that its grader, water truck, and water wagon should be exempt as directly used in the direct production of slag. Taxpayer states that proper road maintenance for points in its slag production process is necessary for the continuous production of slag.

a. Manufacturing

The exemption provided under IC § 6-2.5-5-3 relates to equipment "directly used in the direct production . . ." of tangible personal property. In addition, [45 IAC 2.2-5-8](#)(c) elaborates:

The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

In Taxpayer's case, proper roadways are necessary for Taxpayer's production process. However, the roadways do not have an "immediate effect" on the slag. Taxpayer's grader, water truck, and water wagon serve a necessary maintenance function; however, they are not part of the "integrated process" of producing slag, and thus Taxpayer's protest is denied on these items.

b. Environmental Control

With regard to the water truck and water wagon, Taxpayer also has asserted that these items qualify for exemption under IC § 6-2.5-5-30. IC § 6-2.5-5-30 provides:

(a) Sales of tangible personal property are exempt from the state gross retail tax if:

- (1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and
- (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.

(b) The portion of the sales price of tangible personal property which is exempt from state gross retail and use taxes under this section equals the product of:

- (1) the total sales price; multiplied by
- (2) one hundred percent (100 [percent]).

In this case, Taxpayer is engaged in manufacturing. Taxpayer's operations produce particulate matter which requires Taxpayer to control the release thereof under state and federal environmental regulations and standards. Taxpayer has provided information related to state enforcement of these regulations and standards for Taxpayer's operations. However, Taxpayer has not established that the water truck and water wagon are predominantly used for "the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards." Thus, Taxpayer's protest is denied with regard to its exemption arguments under IC § 6-2.5-5-30.

5. Pick-up Trucks and Yard Trucks

Taxpayer states its purchases of pick-up trucks and yard trucks should be exempt as directly used in the direct production of slag. Taxpayer argues that it uses the trucks to carry supplies, equipment, and repair and replacement parts in order to avoid or minimize manufacturing interruptions.

With regard to these vehicles, [45 IAC 2.2-5-8](#)(c) provides that property for which the exemption applies must "have an immediate effect on the article being produced." Notwithstanding the fact that the trucks have a vital role in ensuring Taxpayer's efficient operations, the trucks themselves do not "have an immediate effect on" the slag. As such, the trucks are not exempt from use tax under IC § 6-2.5-5-3, and thus Taxpayer's protest is denied on these items.

6. Mack Tractors, Side-Dump Trailers, and Semi-Tractor Trailer

Taxpayer explains that it uses Mack tractors, side-dump-trailers, and a semi-tractor trailer to transport in-process "granulated slag" from the steel mill's holding bins to Taxpayer's separator facilities. These items are referenced by Taxpayer only in Taxpayer's discussion of the "granulated slag" process.

As stated above, Taxpayer's process of producing "granulated slag" does not constitute manufacturing within the meaning of IC § 6-2.5-5-3. Thus, even though these items are critical for the production of "granulated slag," that production is not manufacturing because Taxpayer does not sell the "granulated slag."

However, Taxpayer has established that these items are directly used in Taxpayer's process of industrial processing. Under [45 IAC 2.2-5-10](#)(f)(3), "Transportation equipment used to transport work in process or semi-finished material to or from storage is not subject to tax if such equipment is used to transport

work-in-process or semi-finished materials within the production process." These items are used to transport slag during the production process. Thus, the items qualify as "transportation equipment used to transport work in process" within the meaning of [45 IAC 2.2-5-10\(f\)\(3\)](#).

7. Repair and Replacement Parts for Equipment

Taxpayer states that it purchases repair and replacement parts for its equipment. Taxpayer argues that these parts should be exempt as being used in direct production because it uses the parts on exempt equipment. Under [45 IAC 2.2-5-8](#) (h)(2), "Replacement parts, used to replace worn, broken, inoperative, or missing parts on exempt machinery and equipment, are exempt from tax." See also [45 IAC 2.2-5-10\(h\)\(2\)](#). Taxpayer has not provided a specific breakdown of parts and their use on potentially exempt equipment. However, the Department finds that Taxpayer has provided sufficient information to conclude that a supplemental audit is justified. Taxpayer shall provide a listing of the parts and the equipment on which the parts are used. Taxpayer shall be permitted an exemption for each part based on the equipment's exempt use. For instance, if equipment is used ninety percent of the time for an exempt function, the replacement parts for that equipment are ninety percent exempt.

D. Prior Letter of Findings

At the hearing, Taxpayer's representative indicated that the Department's audit contravened IC § 6-8.1-3-3. In particular, Taxpayer's representative stated that the Department had issued Letter of Findings 81-4975-ST (July 27, 1982) for a predecessor of Taxpayer. This Letter of Findings is materially consistent with Taxpayer's contentions in this protest.

However, the Department issued another Letter of Findings 85-7141-ST (August 12, 1986), reversing the previous Letter of Findings on a prospective basis. This Letter of Findings was issued to the same taxpayer as the previous Letter of Findings. Thus, Taxpayer was on notice in 1986 that the Department had determined that the previous Letter of Findings was no longer controlling for Taxpayer's operations.

Further, the provision relied upon by Taxpayer—IC § 6-8.1-3-3(b)—was not enacted until 1987. Even under the interpretation of IC § 6-8.1-3-3(b) most favorable to Taxpayer, the 1982 Letter of Findings was reversed in 1986. Thus, the Department clarified its position with regard to Taxpayer in 1986 and did not require a rule or an interpretation in the Indiana Register to further reverse the 1982 Letter of Findings.

FINDING

Taxpayer's protest is sustained with regard to items 1, 3 (in part), 6, and 7 in part C, and any other items (except items 2, 4, and 5) listed within part C to the extent that Taxpayer can verify that the items are used in direct production or industrial processing. "Direct production" shall be determined as beginning and ending as set forth in part A, and shall include any metal removal occurring after the start of the process and prior to the end of the process. The process of "industrial processing" shall be determined in a manner similar to part A.

Taxpayer's protest is denied with regard to items 2, 3 (in part), 4, and 5 and otherwise with regard to portion of any items protested and not used in direct production as set forth below.

The determination of the percentage exemption Taxpayer is entitled to on any item determined to be exempt is subject to a supplemental audit.

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